Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
CHIBARDUN TELEPHONE COOPERATIVE, INC.	)	CC Docket No. 97-219
CTC TELCOM, INC.	)	
	)	
Petition for Preemption Pursuant to Section 253 of the Communications Act of Discriminatory Ordinances, Fees and Right-of-Way Practices of the City of Rice Lake, Wisconsin	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: THE COMMISSION

REPLY COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS

U.S.:	National Association of Counties
California:	City of Cerritos
Colorado:	City and County of Denver, and the Greater Metro Telecommunications Consortium consisting of 25 other Colorado local governments
Florida:	City of Deerfield Beach, City of Ocala
Illinois:	Village of North Aurora
Michigan:	City of Detroit, City of Grand Rapids, City of Berkley, City of Birmingham, Coldwater Township, Georgetown Charter Township, Grand Rapids Charter Township, City of Gladwin, City of Grandville, City of Livonia, City of Monroe, Robinson Township, City of Southfield, City of Sturgis, Vienna Township, City of Walker, City of Westland, City of Wyoming, and PROTEC (Michigan Coalition to Protect the Public Rights of Way from Telecommunications Encroachments)
Minnesota:	City of Albert Lea
Missouri:	City of Springfield
New Mexico:	City of Santa Fe
Ohio:	Ohio Municipal League
Texas:	City of Arlington, City of Plano, Town of Addison, City of Allen, City of Bedford, City of Carrollton, City of Corpus Christi, City of Duncanville, City of Grapevine, City of Haltom City, City of Irving, City of Laredo, City of Mansfield, City of North Richland Hills, City of Rockwall, City of University Park, and the Texas Coalition of Cities on Franchised Utility Issues

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SUMMARY

These reply comments are filed by Concerned Communities and Organizations ("CCO") consisting of the National Association of Counties and numerous municipalities throughout the country. CCO supports and will not repeat the City of Rice Comments and League of Wisconsin Municipalities Comments in this proceeding.

Chibardun's actions in this case are contrary to the general municipal experience with new facilities-based local service providers. It suggests that what it going on here is other than what is being portrayed, such as Chibardun "setting up" the City and this Commission to create a test case and to that end creating a controversy where none existed. The key for this Commission is that something else apparently is transpiring here other than what Chibardun attempts to portray. The Commission should be alert for the potential abuse of its processes and should exercise extreme caution in proceeding in this case.

These cautions result from actions such as Chibardun's insistence on having meetings with the City in violation of the Wisconsin Open Meetings Act which would potentially jeopardize any license or permit that might be issued; its appealing a "denial" of a permit request which had been filed with the City only one day before; its refusal to supply to the City information which it supplied to an adjacent municipality (City of Barron); and its failure to disclose to this Commission that it had in fact withdrawn its request for permits in June of 1996; among others.

Chibardun's Petition must be rejected because on June 9, 1996 it withdrew all of its requests to construct facilities in the City. Alternatively, Chibardun has failed to comply

with the pleading requirements set forth by this Commission in its City of Troy decision. It has refused to supply any affidavits and has failed to supply anything approaching a "complete and accurate account of the facts in its initial pleadings."

And Chibardun has violated its obligation of truthfulness and candor to this Commission. This is an independent reason why Chibardun's Petition must be denied.

The matters addressed in Chibardun's Petition all relate to right-of-way management and compensation issues. As this Commission correctly recognized in the City of Troy case, these matters lie outside its jurisdiction. The Commission thus lacks the statutory authority to provide the relief which Chibardun requests.

Chibardun's claim that the requirements municipalities impose on telecommunications providers must be "frozen" at some point in time is unsupportable. Municipalities must be able to alter these requirements to meet changing needs.

And Chibardun's request for the Commission to preempt the indemnity, cost reimbursement, insurance and letter of credit provisions of the License Agreement are contrary to the Commission's decision in the Classic Telephone case and may expose municipalities to substantial liabilities. Any decision that prevents municipalities from being reimbursed the full costs imposed on them by a telecommunications provider is confiscatory and a violation of the Fifth Amendment to the U.S. Constitution.

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TO: THE COMMISSION

REPLY COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS

I. INTRODUCTION

Concerned Communities and Organizations, by their special counsel, hereby file reply comments in the above-captioned proceeding with respect to the Petition for Section 253 Preemption filed on October 10, 1997 (the "Petition" or "Chibardun's Petition") by Chibardun Telephone Cooperative, Inc. ("Chibardun"), pursuant to the October 20, 1997 Public Notice, DA 97-2228, by the Federal Communications Commission ("FCC" or the "Commission").

Concerned Communities and Organizations consist of:

The National Association of Counties

California: City of Cerritos

Colorado: City and County of Denver, and the Greater Metro Telecommunications Consortium consisting of 25 other Colorado local governments

Florida: City of Deerfield Beach and City of Ocala

Illinois: Village of North Aurora

Michigan: City of Detroit, City of Grand Rapids, City of Berkley, City of Birmingham, Coldwater Township, Georgetown Charter Township, Grand Rapids Charter Township, City of Gladwin, City of Grandville, City of Livonia, City of Monroe, Robinson Township, City of Southfield, City of Sturgis, Vienna Township, City of Walker, City of Westland, City of Wyoming, and PROTEC (Michigan Coalition to Protect the Public Rights of Way from Telecommunications Encroachments, consisting of many Michigan municipalities).

Minnesota: City of Albert Lea

Missouri: City of Springfield

New Mexico: City of Santa Fe

Ohio: Ohio Municipal League

Texas: City of Arlington, City of Plano, Town of Addison, City of Allen, City of Bedford, City of Carrollton, City of Corpus Christi, City of Duncanville, City of Grapevine, City of Haltom City, City of Irving, City of Laredo, City of Mansfield, City of North Richland Hills, City of Rockwall, City of University Park, and the Texas Coalition of Cities on Franchised Utility Issues (consisting of approximately 90 Texas communities).

As is set forth below, Chibardun's Petition must be dismissed either (1) on the more narrow grounds set forth in Part IV below (such as the fact that Chibardun withdrew its application for a permit with the City of Rice Lake, its failure to plead with the specificity required by this Commission's order in the City of Troy[1] case and its lack of candor, or (2) for the substantive reasons set forth below (such as the lack of subject matter jurisdiction in this Commission, municipalities' Constitutionally protected interests in their rights of way which the Commission cannot affect, and the fact that there has been no prohibition on Chibardun's entering the telephone business in the City of Rice Lake, Wisconsin).

The preceding points and others are set forth below.

II. CONCERNED COMMUNITIES AND ORGANIZATIONS SUPPORT THE COMMENTS OF THE CITY OF RICE LAKE AND LEAGUE OF WISCONSIN MUNICIPALITIES

Concerned Communities and Organizations support the City of Rice Lake's Comments on the Petition and Motion to Dismiss or Deny ("City of Rice Lake Comments" or "Rice Lake Comments") and the Comments on Petition by the League of Wisconsin Municipalities and the Wisconsin Alliance of Cities ("League of Wisconsin Municipalities Comments" or "Wisconsin League Comments").

In combination, the City of Rice Lake Comments and the League of Wisconsin Municipalities Comments set forth in excellent fashion the factual, legal and policy infirmities in Chibardun's Petition. These Reply Comments will not unnecessarily repeat

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[1] In re TCI Cablevision of Oakland County, Inc., FCC 97-331 (Sept. 19, 1997) ("City of Troy").

items covered by the preceding comments but instead attempt to provide supplemental information to aid this Commission in promptly disposing of this matter.

III. THE HIGHLY UNUSUAL FACTUAL CIRCUMSTANCES OF THIS CASE REQUIRE EXTREME CAUTION BY THE COMMISSION IN PROCEEDING

At the outset, Concerned Communities and Organizations wish to advise the Commission that based upon their knowledge and experience (and the pleadings to date in this case), this situation is highly unusual, suggesting that there are hidden agendas present such that it is likely that Chibardun is not acting in good faith or complete candor with either Rice Lake or this Commission. Concerned Communities and Organizations do not know what the true motives for Chibardun's actions are, but based upon experience wish to advise this Commission that they appear to be other than what is portrayed on the face of Chibardun's Petition. As a result, this Commission should proceed with extreme caution and be alert for a potential abuse of its processes.

These concerns flow from two sets of facts, among others: First, disputes between municipalities and rural telephone cooperatives of the type alleged by Chibardun are unusual. This is for several reasons:

-- Rural telephone cooperatives (and their rural electric equivalents) typically serve rural, hard to serve areas. They typically do not engage in going head to head with "overbuilds" where they take on billion dollar players such as Marcus or GTE.

-- Cooperatives are owned and receive their revenues from their members. Chibardun's approximate 5,000 members typically would be responsible (such

as under Rural Utilities Service or other lender requirements) for all costs of the proposed Rice Lake "overbuild" systems, in the event the operations are not profitable. Cooperatives typically are unwilling to expose their members to such financial risks, particularly when the Rice Lake system could cost approximately $5 million.[2]

- Because they are locally owned by the members they serve, cooperatives typically have good relationships with the municipalities where they serve.

Second, the facts specific to Chibardun and its actions with the City of Rice Lake reinforce several concerns arising from the first set of facts:

- Chibardun's insistence on having private meetings with the City's Cable Commission, in violation of Wisconsin's Open Meetings Act.[3]
- Chibardun's giving the City only two weeks to award necessary telecommunications approvals, is extremely unusual.

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[2] Combined cable and telephone systems cost approximately $1,500 per household to build. Rice Lake has a population of approximately 8,000 persons. Allowing for 2.5 persons per household and multiplying by $1,500 results in an investment of approximately $5 million.

[3] State Open Meetings Acts in general require City Councils and subordinate bodies to conduct their sessions "in the sunshine," in public session, with notice and with an opportunity for residents and other interested parties to comment. In terms of this Commission, Chibardun's request is roughly analogous to an applicant in a restricted but publicly noticed proceeding insisting on a private negotiating session with all five Commissioners to negotiate the terms of the order applicable to the applicant, but with the public and affected parties being precluded from participating.

- Chibardun's appealing to the Rice Lake City Council the "denial" of its telecommunications permit request, which had been filed with the City only one day before and had not yet been acted on in any way.
- Chibardun's refusal to supply information requested by the City for it to consider in awarding Chibardun a cable franchise, when it had supplied the same information to other cities (e.g., City of Barron).[4]
- Chibardun's refusal to even meet with or discuss with the City the draft License Agreement sent it for discussion is inexplicable.[5]
- Chibardun's refusal to go to a local court, which is the forum for any right of way management disputes or for claims of unreasonable denial of a cable franchise suggests that it may not want the discovery that would automatically occur in court litigation, raising the question of what it is attempting to hide.
- Chibardun's failure to disclose to this Commission that it, in fact, had withdrawn its request for permits months before it filed the instant Petition with this Commission.[6]

Concerned Communities and Organizations wish to stress to this Commission how Chibardun's actions in this case are contrary to the general municipal experience with new facilities-based local service providers. Usually what happens is that the potential new cable

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[4] Rice Lake Comments, footnote 8 at page 15.

[5] Rice Lake Comments, at 19.

[6] June 9, 1997 Chibardun Letter to City of Rice Lake, Exhibit 3 to Attachment A of Rice Lake Comments ("June 9 Chibardun Letter").

or telephone company first contacts a municipality to indicate its interest and in general to find out what approvals are required, their timing and the procedures to obtain them. The provider and the municipality then work to provide the approvals (permits, agreements, franchises or other), often with give and take on both sides to meet unique substantive or timing requirements. Although there can be -- and often are -- disputes as to the legal rights and obligations of parties, such as under Section 253, these are usually worked out. This is because the provider wishes to provide service and the municipality desires competition for its residents, resulting in generally successful attempts to arrive at an agreeable middle ground on the terms of permits, agreements or franchises such that the provider can start construction.

Chibardun's actions stand in stark contrast to the preceding. Its initial approach to the City of Rice Lake is quite telling: It started out by insisting on private negotiating sessions with the Rice Lake Cable Commission in violation of the Wisconsin Open Meetings Act. Petition, at 5. And it continues to complain to this Commission that it was not allowed to have such (illegal) meetings. Id. This request to violate Wisconsin law is additionally telling because a frequent remedy for violations of Open Meetings Acts is rendering void or voidable actions taken in violation of such Acts. Chibardun's requesting private meetings which might have made any subsequent permits or franchises void or voidable casts significant doubt on whether it, in fact, wanted the City to grant the approvals it was ostensibly requesting.

Chibardun's demand to violate Wisconsin law was then followed by refusals to provide cable system related information which the City of Rice Lake requested -- but which the City (later) found out Chibardun had provided concurrently to the City of Barron, Wisconsin. Finally, in rapid succession, Chibardun on May 20 applied for a telecommunications permit to construct lines in much or all of the City; one day later contended that the permit had been denied and appealed it to the City Council; and, within three weeks, by letter to the City, advised that it had abandoned its plans to build a telecommunications system in the City.

These facts indicate that Chibardun's goal from the outset apparently was to create a situation where it could claim that the City of Rice Lake had denied it the requisite cable and telecommunications approvals, when in fact this was not the case. If Chibardun had truly desired to provide service it would not have acted in this fashion, nor in these extremely compressed time frames.

It thus appears that what is going on here is other than what is being portrayed. As the City of Rice Lake has, in effect, suggested, it may be that Chibardun has set out from the start to "set up" the City -- and this Commission -- to create a "test case" and to that end worked to create a controversy where none existed.[7] And Chibardun in its Petition raises the issue of "greenmail" overbuild applications.[8]

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[7] Rice Lake Comments, at 17; see also pp. 7-9 and footnote 5.

[8] A competing provider filing an application for cable or telephone service with the intent of being "bought off" by the incumbent provider, rather than providing service. See Exhibit D to Chibardun's Petition, at 5.

The key is that something else is going on here other than what is being portrayed, potentially to the point of an abuse of the Commission's processes. The Commission should be alert to this possibility and should exercise extreme caution in these proceedings.

IV. CHIBARDUN'S PETITION MUST BE DISMISSED ON ANY OF SEVERAL RELATIVELY NARROW GROUNDS

A. No Pending Application to City

Chibardun has renounced its plans to build a telecommunications system in the City of Rice Lake. As Chibardun itself has said, "there was a June 1st deadline as a 'go or no go' date for this project" in the City of Rice Lake. June 9 Chibardun Letter.[9] Chibardun then informed the City in the same letter that:

> "[It] has no alternative but to cancel its current plans to provide Cable TV and Telephone service to the citizens of Rice Lake. Notwithstanding these changes and plans, [Chibardun] may still be interested in providing telephone service to the citizens of Rice Lake in following years, if allowed to enter the telecommunications market in a non-discriminatory manner. [Chibardun] will evaluate the political climate, any Rice Lake 'telecommunications ordinance' and customer feedback to make a determination at that time." Id. (emphasis supplied).

Chibardun has thus stated unequivocally that it has abandoned its present plans to provide telecommunications service in Rice Lake but may reconsider this at some point in future years.

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[9] Chibardun had applied to the City for the requisite permits May 20, less than two weeks before June 1. Whether this is simply due to poor planning or incompetence on the part of Chibardun or an attempt to set up this Commission for a "test case" is unclear. See discussion above in Part III.

Having abandoned its application there is simply no case for Chibardun to present to this Commission. The Commission should reject Chibardun's Petition on this ground alone, which removes the necessity for the Commission to address any of the substantive issues raised (on highly incomplete and questionable facts) by Chibardun in this case.

B. Failure to Plead with Specificity as Required by City of Troy Order

This Commission's decision in City of Troy set forth specific pleading requirements that must be met by petitioners asserting a Section 253 claim. This includes supplying the Commission with "credible and prohibitive evidence that the challenged requirement falls within the prescription of Section 253(a) without meeting the requirements of 253(b) and/or (c)." City of Troy, at ¶ 101.

In City of Troy the Commission also specifically instructed applicants that parties' pleadings have to be supported by credible evidence, must include affidavits and must include a "complete and accurate account of the facts in their initial pleadings." City of Troy, at ¶ 77 and footnote 198. Chibardun has failed to state critical facts, such as its June 9 letter withdrawing its application to provide telephone service in Rice Lake. Likewise, it omits the June 23 letter from the City which offered Chibardun the opportunity sign the draft License Agreement "under protest" and subject to whatever orders this Commission or other bodies might enter and allowing construction to proceed at the present time.[10] And although

[10] City of Rice Lake June 23 Letter to Chibardun, Exhibit 10 of Attachment A to Rice Lake Comments ("June 23 Letter").

relying on City of Troy Chibardun has failed utterly to submit the affidavits which City of Troy requires.

The Commission's pleading requirements set forth in City of Troy make sense and are entitled to help afford this Commission with full and complete evidence, not mere rhetoric based on incomplete (and misleading) facts.

The Commission should enforce its ruling in the City of Troy by dismissing Chibardun's Petition for failure to comply with the pleading requirements set forth there. The Commission's ruling in that case makes sense. If it is to have meaning it must be applied here.

C. Lack of Truthfulness and Candor

Chibardun has violated the obligation of truthfulness and candor which applies to all applicants to the Commission. For this reason its Petition must be denied.

The Commission and the courts have repeated stressed the obligation of complete truthfulness and candor required of applicants to this Commission. Specifically, applicants are under a duty of complete candor. As stated in George E. Cameron, Jr., Communications, 91 F.C.C. 2d 870, DA 82R-58 (1982), at ¶ 42:

> ". . . [t]he Commission must rely heavily on the completeness and accuracy of the admissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known. See, e.g., Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240, 243 (D.C. Cir.), *cert. denied*, 449 U.S. 834 (1980) [When there has been a misrepresentation even on a relatively minor matter, the very fact of misrepresentation is more important than the item involved, since the Commission must proceed on the basis of

> absolute trust and confidence in the representations made to it by its licensees.]; Golden Broadcasting Systems, Inc., 68 F.C.C. 2d at 1101-04.

And, where it appears that the duty of candor has not been met by an applicant, the Commission has recognized that the application should be denied, or at the very least, deferred. George E. Cameron, Jr., Communications, 91 F.C.C. 2d 870, DA 82R-58 (1982), at ¶ 43 ("There is no plausible doubt had the Commission been accurately apprised during the pendency of the [application] of the financial and organizational paroxysms then afflicting the applicant, that -- at the very least -- grant of the [application] would have been deferred.").

This Commission, within the last two months, has applied these principles to reject an application for Open Video System (OVS) certification due to lack of candor in the applicant's submission stating:

> ". . . Wedgewood has failed to inform the Commission fully regarding information that could be material in determining whether Wedgewood is eligible to be certified as an open video system operator. The Commission must have full confidence in the truthfulness of representations made to it by applicants for Commission authorization to provide a service or operate a facility. As the United States Court of Appeals for the District of Columbia Circuit has stated, 'the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate.' [citing RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert denied*, 456 U.S. 927 and 457 U.S. 1119 (1982).] An applicant's failure to come forward with a candid statement of relevant facts, whether or not such information is particularly elicited by the Commission, is a breach of the applicant's obligation to be truthful. [citing In re Applications of Liberty Cable Co., WT Docket No. 96-41, 11

FCC Rcd 14133, 14138-39 (1996) and In re Application of Fox Television Stations, Inc., 10 FCC Rcd 8452, 8491-92 (1995).]"

Wedgewood Communications Company, DA 97-2355, ___ FCC Rcd ___, Cable Services Bureau (released Nov. 7, 1997).

Chibardun has similarly "failed to inform the Commission fully regarding information that could be material" and has "fail[ed] to come forward with a candid statement of relevant facts." Key points in this regard include:

- Chibardun's failure to disclose to this Commission its June 9 Letter to the City where it abandoned its plans to construct a telecommunications system in the City.
- Chibardun's failure to reference or attach the June 23, 1997 letter to it from the City where the City offered to allow construction to proceed immediately by letting Chibardun sign the proposed License Agreement "under protest and subject to whatever orders this Commission might enter."
- Chibardun's failure to disclose that its request for secret or private negotiating sessions was directly in violation of the Wisconsin Open Meetings Act.[11]

There is only one effective remedy for lack of candor or truthfulness in an application. It is the remedy which the Commission has exercised in the above-referenced cases -- namely dismissal of the application -- which is what the Commission should do here.

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[11] See description of Open Meetings Act requirements in footnote 3, supra.

V. THE COMMISSION LACKS JURISDICTION TO REVIEW LOCAL REGULATION OF PUBLIC RIGHTS OF WAY OR COMPENSATION REQUIREMENTS FOR THE USE OF PUBLIC RIGHTS OF WAY

The Commission must deny Chibardun's Petition because it relates solely to right of way management and compensation issues which are statutorily beyond the Commission's preemption jurisdiction. 47 U.S.C. § 253(c),(d). In particular, Chibardun objects to certain provisions in the draft License Agreement which not only are clearly right of way management and compensation provisions, but also are reasonable and nondiscriminatory. The Comments of the CMMT Communities (filed in December 1997 in this case) discuss each of the terms and conditions Chibardun cites and shows that they are reasonable right of way management and compensation requirements. See CMMT Comments, at 4-5.

In addition, the City of Rice Lake's Comments and Motion to Dismiss or Deny presents the Commission with a clear picture of each challenged draft License Agreement term and demonstrates that such terms are nondiscriminatory and legitimate right of way management and compensation provisions.

Indeed, the Commission unequivocally stated its reluctance to infringe on the right-of-way management and compensation issues in light of Section 253. In this regard, the Commission in City of Troy opined as follows:

> "We recognize that section 253(c) "preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and

> cable television), and telephone facilities that crisscross the streets and public rights-of-way. We have previously described the types of activities that fall within the sphere of appropriate rights-of-way management in both the *Classic Telephone Decision* and the *OVS Orders*, and that analysis of what constitutes appropriate rights-of-way management continues to set the parameters of local authority. These matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them." City of Troy, at ¶ 103.

The Commission's foregoing conclusion in City of Troy is correct and should be upheld here

Each of the provisions in the draft License Agreement which Chibardun challenges fit squarely within the parameters the Commission set forth in the foregoing statement. It is readily apparent that Chibardun's Petition only raises claims relating to legitimate right of way management and compensation provisions which are outside of the Commission's jurisdiction under Section 253.

This is because Section 253(a) states that state or local regulation that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service is preempted. Section 253(b) allows states and municipalities to impose certain requirements "on a competitively neutral basis and consistent with Section 254." Section 253(d), however, only allows the Commission to preempt the enforcement of regulations found to violate or be inconsistent with Sections 253(a) or (b), and then only to the extent necessary to correct the violation or inconsistency. Right-of-way management and compensation matters described in Section 253(c) are excluded from the preemption

authority in Section 253(d). This analysis is what the Commission accepted in City of Troy, above.

In addition, as CMMT Comments note, in granting Chibardun the relief it requests the Commission would inappropriately give Section 253 the effect of taking local rights-of-way without just compensation in violation of the Fifth Amendment. It is axiomatic that statutes should be construed to avoid constitutional violations. Thus, standard rules of statutory construction negate Chibardun's contention.

The construction of Section 253 described above and in City of Troy is correct and should be upheld. In this regard, the legislative history of Section 253(d) shows that Congress did not grant this Commission jurisdiction to hear Chibardun's claims related to right-of-way and fee requirements. As presented to the Senate in June, 1995, Section 253 (then referred to as Section 254) contained a preemption clause which provided:

> (d) PREEMPTION. -- If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

On June 12, 1995, Senator Feinstein proposed an amendment to the Senate bill which would eliminate the preemption clause in its entirety. In support of the amendment, Senator Feinstein stated:

> "On one hand, the bill before the Senate gives cities and States the right to levy fair and reasonable fees and to control their rights of way; with the other hand, this bill, as it presently stands, takes these protections away.

"The way in which it does so is found in section 201, which creates a new section 254(d) of the Cable Act, and provides sweeping preemption authority. The preemption gives any communications company the right, if they disagree with a law or regulation put forward by a State, county, or a city, to appeal that to the FCC.

"That means that cities will have to send delegations of city attorneys to Washington to go before a panel of telecommunications specialist (sic) at the FCC, on what may be very broad questions of State or local government rights.

* * *

"[P]reemption would severely undermine local governments' ability to apply locally tailored requirements on a uniform basis.

* * *

"The exemption means that every time a cable operator does not like it, the Washington staff of the cable operator is going to file a complaint with the FCC and the city has to send a delegation back to fight that complaint. It should not be this way. Cities should have control over their streets. Counties should have control over their highways.

"The right-of-way is the most valuable real estate the public owns. State, city, and county investments in right-of-way infrastructure was $86 billion in 1993 alone. Of the $86 billion, more than $22 billion represents the cost of maintaining these existing roadways. These State and local governments are entitled to be able to protect the public's investment in infrastructure. Exempting communication providers from paying the full costs they impose on State and local governments for the use of public right-of-way creates a subsidy to be paid for by taxpayers and other businesses that have no exemptions.

* * *

"By contrast, if no preemption exists, the cable company may challenge the city or State action directly to the Federal court in

> the locality and the court will review whether the city or State acted reasonably under the circumstances." 141 Cong. Rec. S8170-S8171 (June 12, 1995) (statement of Sen. Feinstein).

The purpose of Senator Feinstein's amendment, therefore, was to completely deny this Commission jurisdiction to hear any claims regarding local regulations.

On June 13, 1995, Senator Gorton offered an amendment to the Feinstein amendment which would limit the scope of the FCC's preemption jurisdiction so that the FCC would have no jurisdiction over disputes regarding regulation of public rights-of-way and compensation due for the use of public rights-of-way. In support of his amendment, Senator Gorton stated:

> "Now, the Senator from California I think very properly tells us what the impact of [preemption] will be. It does not impact the substance of the first three subsections of this section at all, but it does shift the forum in which a question about those three subsections is decided. Instead of being the Federal Communications Commission with an appeal to a Federal court here in the District of Columbia, those controversies will be decided by the various district courts of the United States from one part of this country across to every other single one.
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> * * *
>
> "So in order to try to balance the general authority of a single Federal Communications Commission against the specific authority of local communities, I have offered a second-degree amendment to the Feinstein-Kempthorne amendment.
>
> * * *
>
> "So this amendment does two things, both significant. The first is that it narrows the preemption by striking the phrase "is inconsistent with " so that it now allows for a preemption only for a requirement that violates the section. And second, it changes it by limiting the preemption section to the first two

> subsections of new section 254; that is, the general statement and the State control over utilities.
>
> "There is no preemption, even if my second-degree amendment is adopted, Mr. President, for subsection (c) which is entitled, "Local Government Authority," and which is the subsection which preserves to local governments control over their public rights of way. It accepts the proposition from those two Senators that these local powers should be retained locally, that any challenge to them take place in the federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions." 141 Cong. Rec. S8212-S8213 (June 13, 1995) (statement of Sen. Gorton).

The Gorton amendment was adopted, resulting in the Section 253(d) preemption language that is in dispute in this case.

This legislative history irrefutably establishes that Congress intended to and did deprive this Commission of any jurisdiction to hear the claims asserted by Chibardun. Local regulations which relate to the control of public rights-of-way or compensation for the use of public rights-of-way are simply not subject to FCC review. Challenges to these local regulations must be brought in local courts, not before the FCC.

VI. THE CLAIM THAT STATES OR MUNICIPALITIES MAY NEVER ALTER STATUTORY, ORDINANCE, FRANCHISE OR PERMIT CONDITIONS APPLICABLE TO TELECOMMUNICATIONS PROVIDERS MUST BE REJECTED

Chibardun's claim that the requirements municipalities impose on telecommunications providers by law or agreement must be "frozen" at some point in time[12] is unsupportable. Municipalities must be able to alter these requirements to meet changing needs.

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[12] Such as when the incumbents "entered the market" or "historically had enjoyed." Petition, at 3, 9, 24-25 and Exhibit D at 2.

The current situation is one where there is:

-- Increasing congestion in the public rights-of-way,

-- An increasing number or providers wishing to use the rights-of-way, and

-- A decline in the financial strength and construction knowledge of such entities.

By contrast, in the past municipalities typically dealt with one telecommunications provider. This monopoly was large, of unquestioned financial strength, usually adhered to high construction practices and bankruptcy was not even remotely a consideration.

Conditions are now changing, and requirements must change in response. New providers often lack the preceding attributes. They often have few assets.[13] Due to competition with its necessary correlation of business failure being allowed, there can be no assurance that the provider will not go bankrupt and abandon its facilities within the rights-of-way. There is a potential for large, unreimbursed damage claims against municipalities as the result of actions of new telecommunications providers (see Section VII.A below).

As a result, municipalities must be able to adapt their ordinances, agreements and other right-of-way requirements to these new conditions. At minimum, they cannot assume that all providers will have the favorable attributes which the incumbent enjoyed in the past. Construction practices will need to be more carefully monitored, inspection requirements may vary from provider to provider (see Section VII.A below), and insurance and bond

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[13] Because they are start-up companies with few unencumbered assets, or, alternatively, if they are a subsidiary of a company with substantial assets they are structured such that the entity with facilities in the rights-of-way is a separate corporation with few unencumbered assets.

requirements may vary with the financial strength of the provider. Bonds, letters of credit and insurance may be less important (or in the case of insurance, may have higher deductibles) for a provider with a large balance sheet or parental guaranty, compared to a provider with few unencumbered assets.

Similarly, as the rights-of-way become more congested, municipalities, of necessity, will have to enforce different and likely more rigorous requirements in order to ensure that it is safely available for all its uses – vehicular traffic, pedestrian traffic as well as utilities.

VII. CHIBARDUN'S CHALLENGE TO THE INDEMNITY AND COST REIMBURSEMENT PROVISIONS REQUIRES A TAKING IN VIOLATION OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION

Chibardun asked this Commission to preempt, inter alia, the provisions of the proposed License Agreement that (1) require Chibardun to indemnify the City for any and all harms that it may cause, (2) require Chibardun to reimburse the City for all costs the City incurs for the review, inspection or supervision of Chibardun's activities and (3) provide insurance and a letter of credit. Chibardun Petition, at 15-16, 22-23. These provisions cannot be preempted, because to do so would be an unlawful taking in violation of the Fifth Amendment to the U.S. Constitution.

A. Importance

Indemnity, insurance, bond/letter of credit and cost reimbursement provisions are important to municipalities. There is a significant risk of major damage claims from utility construction in public rights-of-way, particularly from underground construction. This relates to the potential for contact with electric, steam, sewer, water and gas mains with the